Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

FC 2008-090358 09/28/2009

HONORABLE JAMES P. BEENE

CLERK OF THE COURT
K. Alger
Deputy

IN RE THE MARRIAGE OF
JEFF COLLINS ZUBAIR ASLAMY

AND

RICHELLE COLLINS SONYA E UNDERWOOD

RULING

The Court has received, read and considered Petitioner's "Motion to Set Aside Decree or in the Alternative Motion to Modify and for Relief from Judgment Pursuant to Rule 85(C) and A.R.S. § 25-317," Respondent's Response to same, and Petitioner's Reply.

Factual and Procedural Background

The parties met for an Alternative Dispute Resolution conference on March 26, 2009, before Judge Pro Tem Michael J. Shew. (Decree, at 2; Respondent's Response at 2.)[1] At that conference, the parties entered an agreement in accordance with Rule 69 of the Arizona Rules of Family Law Procedure.[2] Both parties acknowledged on the record and under oath that the agreements reached were in the best interests of the parties' minor child; that the division of community property and debt, spousal maintenance and attorney's fees were fair and equitable; that both parties entered into the agreements voluntarily and of their own free will; that the agreements were not made under threat, force, duress, coercion or undue influence; and, further, that the parties were giving up their right to trial and the agreements were binding. (Decree, at 2-3.) Both parties concede that Petitioner confirmed on the record that he was not under duress or coercion. (Respondent's Response, at 2; Petitioner's Reply, at 2.) Nevertheless, Petitioner contends that the Decree, encompassing the parties' binding Rule 69 agreement, should now be set aside pursuant to Rule 85 of the Arizona Rules of Family Law Procedure, specifically, Rule 85(C)(1)(f), the "catch-all provision." (Petitioner's Motion, at 3-5; Petitioner's Reply, at 2.)

[1] Petitioner's Motion gives the date of the ADR conference as April 7, 2009. (Petitioner's Motion, at 2.)
[2] Rule 69 states, in pertinent part that "[a]greements between the parties shall be binding . . . if the agreements are made or confirmed on the record before a judge."

Law and Analysis

Motion to Set Aside Pursuant to Rule 85(C)

As grounds justifying relief from a binding Rule 69 agreement, Petitioner asserts that his own counsel "coerced" and "threatened" him "into making agreements which he did not think were fair." (Petitioner's Motion, at 3-4.) This assertion, however, is belied by Petitioner's avowal on the record that he made the agreements encompassed by the Rule 69 binding agreement voluntarily, of his own free will, and not as the result of any threat, force, duress, coercion or undue influence. (Decree, at 2.) Petitioner concedes this avowal, and yet still contends that he is entitled to relief under Rule 85(C)(1)(f) because his attorney "demeaned him," and because, since entry of the Decree, he has been "financially devastated." (Petitioner's Motion, at 4-5; Petitioner's Reply, at 2-3.)[3]

Rule 85(C)(1) of the Arizona Rules of Family Law procedure provides, in pertinent part, as follows:

> On motion and upon such terms as are just the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons:
>
> a. mistake, inadvertence, surprise, or excusable neglect;
>
> b. newly discovered evidence, which by due diligence could not have been discovered in time to move for a new trial under Rule 83(A);
> c. fraud, misrepresentation, or other misconduct of an adverse party;
> d. the judgment is void;
> e. the judgment has been satisfied, released, or discharged, or a prior judgment on which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
> f. any other reason justifying relief from the operation of the judgment.

The Court is not aware of any published Arizona case law dealing specifically with Rule 85(C)(1)(f), nevertheless, Arizona case law is clear that, once issued, a decree is final. *See, e.g.*, *In re the Marriage of Louis Michael Zale*, 193 Ariz. 246, ¶ 11, 972 P.2d 230 (1999) (final judgment or decree decides or disposes of a cause on its merits, leaving no question open for judicial determination; judgment is a solemn record which parties have right to rely on; judgment should not be lightly disturbed); *Craig v. Superior Court In and for Pima County*, 141 Ariz. 387, 389, 687 P.2d 395, 397 (App. 1984) (extraordinary circumstances justifying relief from judgment

[3] As part of this argument, Petitioner additionally contends that the Decree, signed by the Court on May 4, 2009, and filed on May 7, 2009, is not actually a final Decree of Dissolution With Children (as it is labeled), but is actually a "Separation Agreement" pursuant to A.R.S. § 25-317. (Petitioner's Motion, at 5-7; Petitioner's Reply, at 2-3.) Nothing in the record before the Court supports this contention.

do not include alleged unfairness resulting from property settlement agreement agreed to and signed by parties as part of dissolution decree). *See also*, A.R.S. § 25-325(A) ("A decree of dissolution of marriage or of legal separation is final when entered, subject to the right of appeal.").

In *Craig*, the court of appeals reversed a trial court's order setting aside substantive parts of a decree of marriage dissolution, stating that "[t]he principal of res judicata prevents [husband] from obtaining a modification of the award based upon facts which could have been raised at the dissolution hearing." In the instant case, Petitioner argues that an email sent by his attorney on March 9, 2009, which allegedly refers to Petitioner (her client) as "an idiot" is evidence of coercion undermining the validity of the Rule 69 agreement and decree. (Petitioner's Motion, at Exhibit A.) Even assuming, first, that the "he" in the referenced email is Petitioner, and, second, that this is evidence of "coercion," the email was sent well in advance of both the Rule 69 agreement on March 26, 2009, and entry of the Decree by the Court on May 7, 2009. Petitioner avowed on the record that he voluntarily entered the Rule 69 agreement, and did not raise any question of coercion at that time. (Decree, at 2.) Moreover, each party avowed, and the Court found, that each party had retained legal counsel of his or her choice and had "given full and mature thought to the making of this Decree and all of the obligations contained" in it. (Decree, at 3, 6-7.)

THEREFORE, IT IS ORDERED denying Petitioner's Motion to Set Aside the Decree pursuant to Rule 85(C) of the Arizona Rules of Family Law Procedure.

Alternative Motion to Modify the Decree

Petitioner alternatively contends that the decree should be modified because he "has been financially devastated" since he entered into a binding Rule 69 agreement, and requests that this Court "reopen and reconsider all terms contained in the Decree." (Petitioner's Motion, at 4-5; Petitioner's Reply, at 3.)

A.R.S. § 25-327

Modifications of maintenance, support and property division are governed by A.R.S. § 25-327(A), which reads, in relevant part:

> . . . the provisions of any decree respecting maintenance or support may be modified or terminated only on a showing of changed circumstances that are substantial and continuing . . . . The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state.

Petitioner's broad assertion of being "financially devastated" by the "current state of the economy" (Petitioner's Motion, at 4) and "current market conditions" (Petitioner's Reply, at 3) in the few short months since entering a binding Rule 69 agreement do not meet the requirement of "substantial and continuing" change in circumstances as required by A.R.S. § 25-321(A). Indeed, Petitioner's use of the word "current" to describe the circumstances belies his argument that he has encountered a "substantial and continuing" change in his circumstances.

Furthermore, a change in value does not meet the statutory requirements for modification of support or maintenance. *See, e.g., Jenkins v. Jenkins*, 215 Ariz. 35, ¶¶ 12, 16, 156 P.3d 1140 (App. 2007) (appreciation in value of father's separate and existing real estate, which was a 25 percent interest in 520 acres of farmland, did not constitute "income" to father for purposes of determining whether modification of child support obligation was warranted, nor does it constitute "changed circumstances"). *See also*, *Marquez v. Marquez*, 132 Ariz. 593, 595, 647 P.2d 1191, 1193 (App. 1982) (holding that an increase in the value of a former wife's property was a reasonably foreseeable change of circumstance and thus did not support a former husband's request for a downward modification of spousal maintenance).

The Court in *Jenkins* went on to reiterate that "the individual seeking modification has the burden of establishing changed circumstances with competent evidence." *Id*. at ¶ 16. Similar to the situation in *Marquez*, the "current market conditions" were reasonably foreseeable at the time Petitioner entered into the binding Rule 69 agreement now entered as the Decree and do not qualify as "substantial and continuing" changed circumstances justifying modification under A.R.S. § 25-327(A). Petitioner has not met his burden of establishing changed circumstances with competent evidence to justify a change in maintenance or support, nor do conditions exist which justify reopening the judgment so as to revisit the property settlement agreed to by the parties. *See* A.R.S. § 25-327(A). *See also*, *LaPrade v. LaPrade*, 189 Ariz. 243, 246, 941 P.2d 1268, 1271 (1997) (trial court does not have jurisdiction to modify property settlement provisions unless circumstances exist which justify reopening the judgment).

A.R.S. § 25-411

Although Petitioner does not specifically argue for a modification of child custody, he calls for reconsideration of "all terms of the Decree." (Petitioner's Motion, at 7.) As such, the Court will also address the appropriateness of modification of child custody orders.

Rule 91(D) of the Arizona Rules of Family Law Procedure. Rule 91(D) states, in part, that "no hearing for modification of a child custody order or decree shall be set unless there is compliance with A.R.S. § 25-411," in addition to the requirements of that rule itself.

A.R.S. § 25-411(A) provides, in pertinent part:

> A person shall not make a motion to modify a custody decree *earlier than one year after its date*, unless the court permits it to be made on the basis of affidavits that there is reason to believe the child's present environment may seriously endanger the child's physical, mental, moral or emotional health.

(Emphasis added.) Also relevant is subsection (F) of A.R.S. § 25-411 which states:

> To modify any type of custody order a person shall submit an affidavit or verified petition setting forth detailed facts supporting the requested modification and shall give notice, together with a copy of the affidavit or verified petition, to other parties in the proceeding, who may file opposing affidavits. The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the pleadings, in which case it shall set a date for hearing on why the requested modification should not be granted.

Petitioner has made no contention regarding the endangerment of the minor child's physical mental, moral or emotional health, and thus provides no grounds to modify the custody orders agreed to by the parties on the record on March 26, 2009, and reflected in the May 7, 2009 Decree.

If Petitioner seeks to modify the custody Order agreed upon in March by the parties, he must do so by motion that complies with the dictates of A.R.S. § 25-411 and the relevant rules. If, upon receiving such a motion, the Court determines that a hearing is required, a hearing will ensue, after which the Court will make findings regarding, among other things, the best interests of the child. *See Pridgeon v. Superior Court*, 134 Ariz. 177, 180-82, 655 P.2d, 4-6 (1982); *DePasquale v. Superior Court*, 181 Ariz. 333, 335-36, 890 P.2d 628, 630-31 (App. 1995); *Georgia v. Georgia*, 27 Ariz.App. 271, 273-74, 553 P.2d 1256, 1258-59 (1976).

IT IS THEREFORE ALSO ORDERED denying Petitioner's alternative Motion to Modify in its entirety.

IT IS FURTHER ORDERED signing this minute entry as a formal order of this Court pursuant to Rule 81(D), Arizona Rules of Family Law Procedure.

/ s / HONORABLE JAMES P. BEENE

JUDICIAL OFFICER OF THE SUPERIOR COURT

All parties representing themselves must keep the Court updated with address changes. A form may be downloaded at: http://www.superiorcourt.maricopa.gov/SuperiorCourt/Self-ServiceCenter.